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No. 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO RESPONDENT'S REPLY MEMORANDUM

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ARGUMENT

I

IN REBUTTAL TO RESPONDENT'S POSITION THAT CONGRESS HAS GIVEN IMPLIED CONGRESSIONAL APPROVAL TO THE DOCTRINE THAT "HOME IS SYNONYMOUS WITH POST OF DUTY".

In his reply memorandum, respondent first argues that the doctrine that "home means post of duty" is valid because administrative rulings to that effect have supported this doctrine since enactment of the travel expense provision in 1921. Respondent then argues that such administrative interpretation has received implied legislative approval as evidenced by the statu-

tory provisions, shown in his appendix to said reply memorandum, pertaining to Congressmen which construes "home" for Congressmen, to be their residence.

A study of the legislative history of the travel deduction expense clause in Section 23(a)(1)(A) discloses beyond question that Congress originally enacted the provision with the intent that "home" be used in the statute in its ordinary meaning and that, as originally enacted, the statute was intended to permit Congressmen to deduct travel expenses while in Washington as Members of Congress.

The pertinent extracts from the Congressional Record in reference to Section 214 of the Revenue Act of 1921, which first enacted the travel expense deduction, are as follows:

From 61 Cong. Rec. 6672:

Mr. Walsh of Massachusetts.

". . . And for the first time there has been inserted these words—

'traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business'.

The department has already ruled that public servants away from home are in pursuit of a trade or business. So that provision of this bill will permit every Representative and Senator to deduct from his income all that he may pay for board and lodging while he is in attendance upon his duties in Washington."

From 61 Cong. Rec. 6673:

Mr. Walsh of Massachusetts.

"Mr. President, I wish to say that when the language to which I have referred was considered by the Committee it was discussed from the stand-

point of allowing the exemption to traveling salesmen. It was thought that their traveling expenses were a matter for proper deduction and that their meals and lodging should also be included in such deduction; but I have no doubt whatever that the department will so interpret the provision, for already in similar cases they have so interpreted it as to permit a Senator or a Representative while here in Washington attending his duties to an exemption for board and lodging. I am not discussing the merits of the question, whether it is wise or unwise; but the fact still remains that the language will permit a Representative or a Senator to charge off as an exemption the amount expended for board and lodging."

* * * * * *

Mr. Walsh of Massachusetts.

". . . I made inquiries and found out what the rulings of the department were, and I came to the conclusion that these deductions could be made by Representatives and Senators as well as by anybody else."

* * * * * *

Mr. Borah.

"I do not understand what the deduction is that may be made, and how it may be made, as the Senator claims, by Members of Congress."

Mr. Walsh of Massachusetts.

"Traveling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business."

* * * * * *

Mr. Walsh of Massachusetts.

"Mr. President, I can not cite the decision, but I can state to the Senator that an expert in the department stated to me that the rulings of the deparment would permit a Senator or a Repre-

sentative to make the deductions I have mentioned."

From the above it is clear that the original intent of Congress was not to construe the word "home" as being synonymous with "post of duty."

A study of the legislative history pertinent to the special provision enacted for the benefit of Congressmen discloses that Congress did not affirm the doctrine that "home is synonymous with post of duty" in enacting such legislation. Conversely, Congress specifically and unequivocally renounced such interpretation and enacted the special provision for the sole purpose of overcoming the Tax Court's (Board of Tax Appeals) interpretation of "home being synonymous with post of duty" as applied to Congressmen in *George W. Lindsay*, 34 B.T.A. 840 (1936).

The statutory provisions set forth in the respondent's appendix to his reply memorandum do not confer implied legislative approval on the doctrine that "home is synonymous with post of duty." Conversely, such statutes reject the doctrine. The intent of Congress is disclosed in the following extracts taken from the Congressional Record pertaining to the legislation referred to by respondent:

From 98 Cong. Rec. 5280-5281:

Mr. McCormak.

"The purpose of the amendment is to insure that Members of Congress are treated for Federal income tax purposes comparably with other taxpayers similarly situated."

* * * * * *

"Section 23(a)(1)(A) of the Internal Revenue Code allows to all taxpayers as deductions from

gross income traveling expense—including the entire amount expended for meals and lodging—while away from home in the pursuit of a trade or business. Such a provision was first inserted in the Revenue Act of 1921."

* * * * * * *

"Tax administrators and judges have had difficulty in arriving at a definition of the term "home" and in applying the language to specific cases."

At this point a discussion follows of certain administrative rulings which have interpreted "home as being synonymous with post of duty."

Mr. McCormak.

"Now let us see how these rules have been applied to Members of Congress. The Tax Court has held that the home of a Member of Congress for tax purposes is the District of Columbia, on the theory that this is the business location, post or station of Members of Congress. On this reasoning—*which is judicial legislation if I have even (sic) seen it*—the expenses of a Member of Congress while attending a session of Congress were held not to be deductible—see *George W. Lindsay*, (34 B.T.A. 840 (1936))." (Emphasis added).

* * * * * * *

"Members of Congress are certainly not entitled to any better treatment under the income-tax laws than is accorded other taxpayers. Neither should they be an object of discrimination under the tax law."

* * * * * * *

"In all fairness, however, Members of Congress should not be expected to absorb without deduction for tax purposes business expenses which would be deductible to other taxpayers similarly situated."

From 99 Cong. Rec. 7003-7004:

Mr. McCormak.

"This amendment simply gives to *Members of Congress that which every other person in the country has; a determination legally that our home, where we live, is our place of residence for tax-paying purposes, instead of its being the District of Columbia.* It gives us the right to deduct business expenses—that is all—in connection with the performance of our duties as Members of Congress. This is the same right that any other business man has, and which he should have." (Emphasis added).

* * * * * *

"The purpose and the effect of this amendment is to give to Members of Congress under the tax laws the same privileges everybody else has."

From 99 Cong. Rec. (App.) A5098:

Mr. Fisher.

"Section 23(a)(1)(A), referred to in the amendment, allows to all taxpayers as deductions from gross income, traveling expenses, including the amount expended for meals and lodging—while away from home in the pursuit of a trade or business. This has been the law since 1921.

"But the Commissioner of Internal Revenue has had difficulty in interpreting the location of a taxpayer's home . . ."

* * * * * *

"It has been pointed out that lobbyists—or a business or professional man—may make such deductions while living in Washington but that Congressmen could not. And it was in attempt to remove that discrination that this legislation was inspired."

* * * * * *

> ". . . It was proposed to allow Congressmen the same identical deduction privileges that are—and for 30 years have been—allowed to lobbyists, business or professional men and other taxpayers who have occasion to come to Washington, or go elsewhere away from home, on legitimate business missions."

From the above it is apparent that Congress has never affirmed the doctrine that "home is synonymous with post of duty" but has clearly rejected such interpretation of Section 23(a)(1)(A).

Respondent's interpretation would place Congress in the position of seeking preferential legislation for itself. However, the legislative history shows that Congress was seeking to avoid discrimination against Members of Congress, not create legislation discriminating in their favor.

II

IN REBUTTAL TO RESPONDENT'S POSITION THAT PETITIONERS HAVE FAILED TO BRING THEMSELVES WITHIN THE "EXCEPTION", VIZ., THAT THE EMPLOYMENT WAS TEMPORARY.

This position of the respondent has been previously advanced in his brief. (Resp. Brief, pp. 15-16). As developed in petitioner's reply brief (pp. 7-8), petitioners again submit that *no* evaluation of the evidence was made by the Court of Appeals below. The evidence in this proceeding fully substantiates the factual determination of the Tax Court that the expenses in question were not personal and that the employments were in fact temporary.

It is firmly established that factual determinations of a trial court should not be upset by appellate action unless such determination is clearly erroneous. (Rule 52 (a) F.R.C.P.) It is submitted that there is

abundant evidence to support the findings of the trial court and that such findings are correct. (Pet. Br., pp. 6-12).

CONCLUSION

In consideration of the above, it is respectfully submitted that the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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